STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF KATRINA GORGES, by its Personal Representative AZIZ ISSA GORGES, and AZIZ ISSA GORGES, Individually,

Plaintiff-Appellant,

v

FATIN SABAH KENNA,

Defendant-Appellee.

UNPUBLISHED
January 22, 2009

No. 280665
Macomb Circuit Court
LC No. 2005-005171-NO

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiff Aziz Issa Gorges, individually and on behalf of the estate of his deceased wife, Katrina Gorges, appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability and wrongful death action. For the reasons set forth in this opinion, we affirm.

At approximately 1:00 a.m. on December 26, 2002, Katrina slipped and fell on an icy sidewalk while leaving defendant's house after visiting with relatives. Defendant did not recall whether it was slippery on the night that Katrina fell, but defendant did remember that either her brother or her father hired someone to shovel the sidewalk and the driveway. Defendant's brother, Ayad, testified that he recalled that the sidewalks had been freshly cleared but by evening there was a little bit of snow on them. No one testified that there was any evidence of black ice. Plaintiff testified that the ground was icy when he left his apartment with his wife on December 25, 2002, to visit plaintiff's son, and that the roads were slippery. Later that night, between 9:00 and 10:00 p.m., plaintiff and Katrina and some other relatives went to defendant's home. Plaintiff testified that at the time, there were "little showers and snow [was] coming down." As a result of the "rainy snow," there was water on plaintiff's clothing and hair, and when he removed his shoes, they were wet. Plaintiff and Katrina stayed at defendant's home until about 1:00 a.m. on December 26, 2002. Plaintiff testified that he did not notice that it was slippery when they left, but he could not see the ground because there were no lights. As they approached the juncture where the sidewalk and driveway meet, Katrina slipped and fell. Plaintiff testified that after Katrina's fall, he touched the sidewalk and noticed that it was slippery and that the walk was not level.

Plaintiff and his son took Katrina to the emergency room. She had hip surgery and remained hospitalized for ten or twelve days. Plaintiff stated that after the accident, Katrina "never got back to normal." Late in 2004, plaintiff took Katrina to the hospital because she had a high fever. She was in intensive care for a month. Her condition improved slightly for a short time, but then she began spitting and vomiting blood. She died on January 11, 2005. Katrina had had a liver transplant in March 1993, and doctors told plaintiff that the cause of death was internal bleeding. The death certificate lists the cause of death as "Gastrointestinal bleed" and "Acute renal failure."

Plaintiff filed this action on December 22, 2005, alleging that Katrina's fall proximately caused her death on January 11, 2005. The trial court, relying on the open and obvious doctrine, granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

This Court reviews a trial court's decision granting summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, and any affidavits, depositions, admissions, or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists to warrant a trial. MCR 2.116(G)(3)(b); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

A landowner's duty to a person who enters his or her land depends on whether the person is a trespasser, a licensee, or an invitee. Here, it is undisputed that Katrina was a licensee, which is "a person who is privileged to enter the land of another by virtue of the possessor's consent." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). After the plaintiff's status is established, "the next questions are whether [the defendant] breached the attendant duty and whether any such breach proximately caused the injuries at issue." *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001).

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit. [*Id.* (citation omitted).]

When a dangerous condition is open and obvious, that is generally enough to apprise an adult licensee of the risks involved. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 67; 680 NW2d 50 (2004). A condition is open and obvious if "an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). "Because the test is objective, this Court looks not to whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his or her position would have foreseen the danger." *Id.*

The evidence showed that Katrina had lived in Michigan for approximately 12 years, was familiar with Michigan winters, and knew that there could be ice in winter conditions. When Katrina arrived at defendant's house, it was late at night, there was freezing rain, and it was cold

and windy. Katrina left defendant's house at approximately 1:00 a.m., and slipped on ice on the sidewalk while she was leaving. Given the time of night and the weather conditions, a reasonable person would have anticipated and foreseen that there could be ice on the sidewalk. Thus, the condition was open and obvious.[1]

Moreover, Katrina was a licensee, but even under the higher standard of care due an invitee, accidents involving commonly occurring defects, such as differing floor levels and steps, are not actionable unless "unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Only such "special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518-519; 629 NW2d 384 (2001). "[T]ypically open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to these special aspects." *Id.* at 520.

Plaintiff asserts that the sidewalk where Katrina fell was unreasonably dangerous because it was not level and because there was no lighting due to a broken porch light. However, dark nights and uneven sidewalks are encountered on a daily basis, and Katrina certainly was aware that it was dark outside late at night. *Id.* There were no special aspects here that created an unreasonably high likelihood of harm or risk of severe harm beyond that typically associated with a fall to the ground on an icy walkway. Plaintiff also asserts that the sidewalk and broken porch light violated applicable building codes, but "even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous." *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003). Because the condition was open and obvious and there were no special aspects that rendered the condition unreasonably dangerous despite its open and obvious nature, the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff also argues that the trial court abused its discretion by denying him an opportunity to amend his complaint. MCR 2.116(I)(5) provides that "if the grounds asserted [in a motion for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Here, the trial court denied plaintiff's request to amend on the basis of futility. An amendment is not justified if it would be futile. *Liggett Restaurant Group v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003). A trial court's denial of a request to amend is reviewed for an abuse of discretion. *Id.*

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[1] Plaintiff, in a supplemental filing, asks this Court to apply its decision in *Slaughter v Blarney Castle Oil Co*, __ Mich App __; __ NW2d __ (2008) (2008 Mich App LEXIS 2147) to this action. We decline to do so given the lack of any evidence of black ice in this case coupled with the distinct factual differences between this case and *Slaughter*. Unlike the plaintiff in *Slaughter*, plaintiff in this case testified that Katrina was on notice of the weather conditions and therefore was aware of the high likelihood that ice and snow existed on the driveway and sidewalk.

Plaintiff argues that he should have been allowed to amend his complaint to provide "more clarification of applicable [building] Codes," but does not explain what clarification he intends to provide, or why any proposed amendment would not be futile. As previously indicated, "even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous." *O'Donnell*, *supra* at 578. Plaintiff has failed to demonstrate that any amendment would not be futile. Accordingly, the trial court did not abuse its discretion in denying plaintiff's request to amend his complaint.

Because the trial court did not err in granting defendant's motion for summary disposition on the basis of the open and obvious doctrine, it is unnecessary to consider plaintiff's remaining argument regarding whether it was proper for the trial court to consider the issue of proximate cause, i.e., whether Katrina's fall proximately caused her death more than two years later.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello